IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

KAREN ARMSTRONG,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
vs.	:	4:13-CV-00050-HLM
	:	
FLOYD COUNTY, GEORGIA, et al.,	:	
	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

On April 10, 2013, Defendants City of Rome, Rome-Floyd Parks and Recreation Authority, and Richard Garland ("Defendants") moved to dismiss Plaintiff Karen Armstrong's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs timely file this Brief in Opposition to Defendants' Motion to Dismiss as follows.

I. INTRODUCTION

Plaintiff's Complaint sets forth five counts brought pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourth and Fourteenth Amendments to the U.S. Constitution, O.C.G.A. § 51-7-40, and O.C.G.A. §36-33-4, arising from the wrongful arrest and malicious prosecution of Plaintiff by and through the intentional acts, customs, policies and omissions of the Defendants. Contrary to Defendants' characterization, the Complaint goes far beyond the "short and plain statement of the facts" required by FED. R. CIV. PROC. 8. Instead, the Complaint paints a vivid, detailed description of the events giving rise to Plaintiff's arrest, prosecution, and ultimate acquittal. The Complaint describes specific facts that will support the ultimate conclusion that Plaintiff's arrest and prosecution were due to the intentional and malicious acts of Defendant Richard Garland, acting as a final policy-maker for the City of Rome, Floyd County, and their jointly controlled entity the Rome-Floyd County Parks and Recreation Authority (RFPRA).

Ironically, while Defendants accuse Plaintiff's complaint of "containing conclusory allegations, legal conclusions, unwarranted inferences, and 'threadbare recitals'" it is Defendants' Motion that is conclusory, threadbare, and lacking in analysis.

II. STATEMENT OF FACTS

The facts alleged in the Complaint—and which this Court must accept as true for purposes of the instant Motion—are these: Armstrong, an experienced gymnastic coach, headed an educational gymnastics program for RFPRA. (Complaint at ¶¶ 11-15) Along with the gymnastics program, she also established a competitive gymnastics team known as the "Flip City Aerials" (hereinafter referred to as "Flip City"). (Id. at ¶¶ 12, 15-16). The Flip City team was made up of young people who wished to go beyond the regular gymnastics program and develop their gymnastics skills to a competitive level and compete in regional competitions. (Id.).

During her time at RFPRA, Richard Garland ("Garland") was its Executive Director, and had final policymaking authority on behalf of RFPRA. (See id. at ¶¶ 1,9).

Armstrong routinely collected funds from "Flip City" parents for expenses related to competitive gymnastic events, and paid these expenses from her personal bank account. (Id. at ¶ 19.). This practice of collecting funds and paying costs from a coach's personal bank account was common among coaches for many sports at RFPRA and was well-known to Garland. (Id. at ¶ 20). There was no RFPRA policy prohibiting Armstrong from collecting money from parents to purchase team items and pay team fees, and another gymnastics coach, assistant coordinator and assistant Flip City coach, Haley Murray, utilized the same methods as Armstrong for collecting funds and paying team expenses. (Id. at ¶¶ 21-22.) Garland never raised any concern about this practice with Murray, and in fact, put Murray into Armstrong's position after initiating the criminal investigation of Armstrong. (Id.). At Armstrong's trial, when asked why Murray was not also investigated, Garland could only respond, "she was not the focus of our investigation, Karen [Armstrong] was." (Id.)

Despite Garland's knowledge that Armstrong's use of her personal account to pay team expenses was compliant with RFPRA policy and was a common practice among coaches, and without any probable cause to believe she had committed a crime, Garland initiated a criminal investigation by reporting to the Rome Police that Armstrong had misappropriated funds from parents in the course of her work by personally accepting funds for the payment of team expenses. (Id. at ¶ 23.).

At the urging of Garland, the Rome Police initiated an investigation. (Id. at ¶ 24). Yet, despite Armstrong's full cooperation with the investigation, and the lack of any evidence that she had misappropriated funds or otherwise engaged in any sort of criminal conduct, Garland continued to urge the criminal investigation and prosecution of Armstrong. (Id. at ¶ 25.). Garland sought to manipulate the investigation by the City of Rome Police by making intentional misrepresentations and purposefully withholding exculpatory information and evidence. (Id. at ¶ 26.).

One particularly egregious instance of Garland's attempt to mislead the investigation involved Garland's failure to provide cash receipt books, which evidenced thousands of dollars that had been taken in by Armstrong and properly turned over to RFPRA. (Id. at ¶ 27.) Despite having these receipt books, which would have conclusively demonstrated that the funds in question had been properly accounted for, and not misappropriated by Armstrong, Garland hid them from authorities and fraudulently stated that the funds evidenced within those receipt books were stolen by Armstrong. (Id.).

At the criminal trial, when questioned as to why these receipt books were never turned over to local authorities, Garland fraudulently stated that they had been found months after the investigation had concluded and were "stuffed away in a concession stand cabinet next to Armstrong's office." (Id. at ¶ 28.) However, defense counsel had located an internal memorandum to Garland, notifying him that these receipt books were in fact found in Armstrong's desk the day Armstrong was suspended on February 9, 2010. (Id.). Another RFPRA employee, Karen Earwood, admitted at trial that the receipt books had been found on or about February 9, 2010 in Armstrong's office, and not, as Garland falsely stated "stuffed away in a concession stand" for months. (Id.).

Further, Garland intentionally withheld from the criminal investigator the fact that RFPRA teams routinely received monies from parents, deposited that money into their personal accounts, and used that money to pay for team expenses. (Id. at ¶ 29.). Garland omitted the fact that at least one other RFPRA gymnastics coach, Haley Murray, had routinely done the exact same thing. (Id.). As a result, the criminal authorities were led to believe that Armstrong had violated policy by personally handling Flip City funds. (Id.).

Garland was motivated by both malice and greed in seeking Armstrong's prosecution. (Id. at ¶ 30.). Garland also used Armstrong's prosecution as an opportunity to defraud the RFPRA's insurance carrier. (Id.). In his own handwriting, Garland wrote to Ms. Earwood, "RUN WITH THIS AS FAR AS YOU CAN. CREDIT THE REST. THEN WE NEED TO CONTACT INSURANCE COMPANY OUR POLICY WILL PAY FOR IN HOUSE THEFT." (Id.).

Despite the fraud, concealment of evidence from law enforcement and lies by Defendant Garland and his employees, following a one-week trial, a Floyd County jury acquitted Plaintiff of all charges on March 24, 2012. (Id. at ¶ 31.) The jury was out less than two (2) hours. (Id.).

The arrest and prosecution of Plaintiff for charges of which she was completely innocent, in a public forum that caused her name to be publically dragged through the mud, caused and continues to cause significant damage to Plaintiff, including severe emotional distress, humiliation, embarrassment, damage to reputation, attorneys' fees, and lost income. (Id. at ¶ 34-37).

III. LEGAL ARGUMENT AND CITATION TO AUTHORITY

A. Introduction

Plaintiff's complaint clearly and succinctly lay out the relevant facts and grounds for each and every count included therein. Plaintiff has included more than enough factual allegations to survive Defendants' Motion. The malicious acts of fraud and negligence are clearly defined, the actors are clearly identified, and Plaintiff has identified relevant dates and locales with specificity in her Complaint. Plaintiff has not only described her arrest, prosecution, trial, and acquittal, she has laid out specific facts that she contends will support the ultimate conclusion that Defendants caused her arrest and urged her prosecution in bad faith, in the absence of probable cause, and with a malicious desire to cause Plaintiff emotional distress.

As a preliminary matter, a comment on the nature of Defendants' Motion is in order. Judge Clay D. Land, of the Middle District of Georgia, recently issued an order decrying the misreading and abuse of recent Supreme Court precedent that has greatly expanded the use of Motions to Dismiss in federal court, to wit:

> The Supreme Court's statement in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), which was reaffirmed in Ashcroft v. Iqbal, 556 U.S. 662 (2009), did not seem startling: to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; accord Iqbal, 556 U.S. at 678. The additional explanation that the complaint must include sufficient factual allegations "to raise a right to relief above the speculative level," Twombly, 550 U.S. at 555, likewise did not suggest that the Supreme Court intended to rewrite Rule 12(b)(6) or abandon notice pleading; and the Court's observation that "a formulaic recitation of the elements of a cause of action does not suffice, id., did not seem to foreshadow a sea change in the legal standard governing motions to dismiss. But many lawyers (and judges) have interpreted the Supreme Court's decisions in Twombly and Iqbal as ushering in a new era for motions practice in federal court. From this Court's perspective and experience, Twombly has become the most overused tool in the litigator's toolbox. Since Twombly was decided,

> many lawyers have felt compelled to file a motion to dismiss in nearly every case, hoping to convince the Court that it now has the authority to divine what the plaintiff may plausibly be able to prove rather than accepting at the motion to dismiss stage that the plaintiff will be able to prove his allegations. ***These motions, which bear a close resemblance to summary judgment motions, view every factual allegation as a mere legal conclusion and disparagingly label all attempts to set out the elements of a cause of action as "bare recitals."*** They almost always, either expressly or, more often, implicitly, attempt to burden the plaintiff with establishing a reasonable likelihood of success on the merits under the guise of the "plausibly stating a claim" requirement. While these cautious lawyers, who have been encouraged by Twombly and Iqbal, have parsed the Twombly decision to extract every helpful syllable, they often ignore a less well known (or at least less frequently cited) admonition from Twombly: "Rule12 (b) (6) does not permit dismissal of a well- pleaded complaint simply because 'it strikes a savvy judge that actual proof of those facts is improbable.'" Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting Twombly, 550 u.s. at 556). Blinded by the Twombly/Iqbal compulsion, many lawyers fail to appreciate the distinction between determining whether a claim for relief is "plausibly stated," the inquiry required by Twombly/Iqbal, and divining whether actual proof of that claim is "improbable," a feat impossible for a mere mortal, even a federal judge.

Order of December 12, 2012 in Mayer v. Snyders Lance, Inc., Case No. 4:12-cv-00215 (emphasis added) (Attached as Attachment 1).

With their Motion to Dismiss, Defendants fall prey to the very "Twombly/Iqbal compulsion" warned against by Judge Land. And, while they accuse Plaintiff's complaint of "containing conclusory allegations, legal conclusions, unwarranted inferences, and 'threadbare recitals' of a cause of action," it is Defendants' Motion that is nothing more than legal conclusions and "threadbare" misstatements of the pleading standards announced in Twombly and its' progeny. As shown below, Plaintiff's Complaint sufficiently pleads factual bases to support all five of her counts under the Twombly-Iqbal standard. Accordingly, Defendants' Motion should be denied.

B. The 12(b)(6) Standard of Review

The Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U. S. 662, 129 S. Ct. 1937 (2009) establish the current pleading standard under the Federal Rules of Civil Procedure. While Twombly retired the oft-cited "no set of facts" standard from Conley v. Gibson, 355 U.S. 41 (1957), the starting point in assessing the sufficiency of a pleading remains Rule 8's requirement that, as far as facts are concerned, a well-pleaded complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. PROC. 8(a)(2).

In considering a 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. Twombly, 550 U.S. at 555-56.

C. Plaintiff's Claims Are Sufficiently Pled under Rule 8, the *Twombly-Iqbal* Standard, and the Eleventh Circuit's two-pronged approach announced in Am. Dental Ass'n.

1. Plaintiff's Complaint is sufficiently pled, and does not contain conclusory allegations, nor improper legal conclusions

Defendants' Motion states, ironically, in wholly conclusory language, that the following Paragraphs of Plaintiff's Complaint "are conclusory in nature, are legal conclusions, or contain impermissible inferences and thus should be eliminated…Paragraphs 1-10, 20, 22-35, 37-56; and the unnumbered Paragraphs containing Plaintiff's prayer for relief." In doing so, Defendants seek to isolate individual paragraphs, requesting that the court look at those paragraphs in a vacuum, devoid of the context provided by the surrounding paragraphs. Defendants fail to explain why these Paragraphs are conclusory and they cite no law supporting their completely conclusory statements, before ultimately concluding "these Paragraphs are not 'well-pleaded factual allegations,' they should be eliminated from…determination."

For example, Defendants argue that Paragraphs 1-10 are somehow conclusory or impermissible, and should not be considered. These Paragraphs include Plaintiff's "Introduction", "Jurisdiction and Venue", "The Parties", and Plaintiff's "Jury Trial Demand". These Paragraphs, in addition to containing information required by the Federal Rules of Civil Procedure and the local rules of this Court, contain **facts**, not conclusions or inferences. Do Defendants really contend that it is an impermissible "conclusion" that "City of Rome, Georgia is a municipal entity…" (¶ 6), that "Richard Garland was the duly appointed Executive Director of the RFPRA…" (¶ 9), or that "Plaintiff demands a trial by jury…" in this case (¶ 10)? These do not state legal conclusions, they state verifiable facts.

The same is true for Plaintiff's Paragraphs 20 and 22-35. These are factual statements that are more than sufficiently pled under Rule 8. These factual Paragraphs include names, dates, and locations for the statements included therein. It is important to remember that for purposes of Defendants' Motion, Plaintiff's Complaint must be accepted by the Court as true. Twombly, 550 U.S. at 555-56.

By way of further example, Defendants single out Paragraph 20 as conclusory, or otherwise impermissible. Plaintiff's Paragraph 20 reads:

> This practice of collecting funds and paying costs from a coach's personal bank account was common among coaches for many sports at RFPRA and was well-known to Garland. There was no "booster club" or similar parent organization associated with Flip City, so Armstrong was required to handle most of the accounting herself.

Again, this is a detailed factual statement. It makes no legal conclusions. It states facts, that may be proven or disproven by the evidence developed in discovery. Admittedly, Paragraph 20 does not recite a favorable fact for the Defendants' case, but, again, an unfavorable fact, does not a conclusory statement make.

2. *Each of Plaintiff's counts, as pled, state a claim for which relief may be granted*

Defendants argue that each of Plaintiff's five counts fail as a matter of law. As shown below, Plaintiff's Complaint sufficiently pleads all five of its' counts under the Twombly-Iqbal standard, and each clearly state a claim for which relief may be granted.

a. Count I: Fourth Amendment to the United States Constitution 42 U.S.C. §1983.

Count I of Plaintiff's complaint states a claim under 42 U.S.C. §1983 for the violation of Armstrong's rights under the Fourth Amendment to be free from "unreasonable searches and seizures," which includes the right to be free from false arrest and malicious prosecution. A federal malicious prosecution claim under § 1983, incorporates the elements of the common law tort of malicious prosecution. Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003). The common law elements of the tort of malicious prosecution are: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused. Id. at 882.

Moreover, where a public official causes the arrest and prosecution of another by withholding important information or making misrepresentations of fact, he is liable for false arrest and malicious prosecution under § 1983. Buckner v. Williamson, 3:06-CV-79 (CDL), 2008 WL 2415265 (M.D. Ga. June 12, 2008). The Buckner case is closely analogous to the instant case. In Buckner, the University of Georgia Police Department was investigating whether an employee of one of the University's programs had stolen some University property. In fact, the employee worked from home, and had the property at her home for that purpose. The Director of the program knew that the employee worked from home and had the property there for that reason. However, when questioned by investigators, the Director did not disclose this information, and in fact provided officers with misleading information, which led to the employee's arrest and prosecution.

The Court in Buckner surveyed the relevant law and determined not only that the employee stated causes of action for false arrest and malicious prosecution under § 1983 against the Director, but also that the Director was not entitled to qualified immunity, to wit:

> The Eleventh Circuit has recognized "a federal right to be free from prosecutions procured by false and misleading information." *Kelly,* 21 F.3d at 1549 (internal quotation marks and citation omitted). Along these lines, this Circuit has held that a government official may be found liable under § 1983 for instigating or causing an unlawful arrest or malicious prosecution. *Cf., e.g., Jordan,* 487 F.3d at 1354 (holding that "[i]n this Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment"). In addition, "[k]nowingly making false statements to obtain an arrest warrant can lead to a Fourth

> Amendment violation." *Whiting,* 85 F.3d at 585 n. 5 (citing *U.S. v. Martin,* 615 F.2d 318, 327-29 (5th Cir.1980)); *accord Kalina v. Fletcher,* 522 U.S. 118, 122, 131, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (holding that § 1983 may provide a remedy when a prosecutor acting as a "complaining witness" misrepresents information in a probable cause certification); *Kingsland,* 382 F.2d at 1232 (noting that "falsifying facts to establish probable cause is patently unconstitutional").

Buckner v. Williamson, 3:06-CV-79 (CDL), 2008 WL 2415265 (M.D. Ga. June 12, 2008).

Paragraphs 39-43 of Plaintiff's Complaint, when read with Plaintiff's Statement of Facts, more than adequately state a claim for malicious prosecution in violation of Armstrong's rights under the Fourth Amendment to be free from unreasonable seizures. As a preliminary matter, Armstrong was clearly "seized" under the Fourth Amendment because she was arrested, taken into custody, indicted, and tried for her alleged "crime". California v. Hodari D., 499 U.S. 621, 626-27, 111 S. Ct. 1547, 1550-51, 113 L. Ed. 2d 690 (1991). (See ¶ 31).

Common Law elements one, three, and four are equally clear. As alleged, Garland initiated and instigated the arrest and ultimate prosecution of Armstrong, satisfying the first element of a malicious prosecution claim. (See ¶ 23). The case ended in an acquittal for Armstrong (See ¶ 31), thus satisfying element three, and Armstrong's damages are obvious: lost job, attorney's fees, damage to her reputation, severe emotional distress, and other financial hardships (See ¶¶ 34-37), thus satisfying element four.

As to element two, Garland's action and inactions clearly indicate both malice and the lack of probable cause. In fact, malice may be inferred from the lack of Probable Cause.

> Malice is not only an essential element of malicious prosecution but it is the gist of this cause of action. Such malice may be one of two kinds: (a) actual or subjective malice, sometimes called 'malice in fact,' which results in intentional wrong; and (b) 'legal malice,' **which may be inferred from circumstances such as the want of probable cause**, even though no actual malevolence or corrupt design is shown.

Ware v. United States, 971 F. Supp. 1442, 1468 (M.D. Fla. 1997) (emphasis supplied).

Malice and probable cause, in a malicious prosecution claim, are, therefore, closely linked, if not synonymous. Garland's actions in initiating and sustaining the prosecution of Armstrong exhibited "malice in fact", "legal malice", and the clear want of probable cause, as evidenced by the following facts:

- Garland knew that other coaches at the RFPRA regularly deposited funds from parents into their personal bank account, for sports-related purposes, and that doing so was not indicative of theft (See ¶¶ 20, 23).
- Garland knew there was no RFPRA policy prohibiting such action (See ¶¶ 21, 23)
- Garland knew that the assistant gymnastic coach regularly did the exact same thing, yet he never investigation her, and later promoted her to fill

Armstrong's position (See ¶ 22).

- Garland refused to turn over exculpatory evidence to investigators (See ¶¶ 27-29).
- Garland sought to financially benefit from the arrest and prosecution of Armstrong (See ¶ 30).

Garland acted with both malice (actual and legal), and in the absence of probable cause, as no reasonable person could have believed Armstrong was guilty of any crime under the circumstances, yet he continued to participate in and encourage Armstrong's prosecution, thus satisfying the second element of a malicious prosecution claim. Twombly's plausibility threshold requires only "enough fact to raise a reasonable expectation that discovery will reveal evidence of [a claim]." 550 U.S. at 556.

Accordingly, Plaintiff has sufficiently pled a count for malicious prosecution in violation of Armstrong's rights under the Fourth Amendment to the United States Constitution pursuant to 42 U.S.C. §1983. At the very least there exists a jury question over the existence of malice and the want of probable cause. "It is well settled that in an action to recover damages for malicious prosecution where…the evidence is in dispute, the existence or non-existence of malice and want of probable cause are questions of fact for the jury. Kingsland v. City of Miami, 382 F.3d 1220, 1235 (11th Cir. 2004)(internal quotations omitted).

b. Count II: O.C.G.A. § 51-7-40 (State Law Malicious Prosecution Tort).

Similarly, Plaintiff has stated a claim for malicious prosecution under Georgia law. The elements of a malicious prosecution claim under Georgia State law essentially track the Federal elements: 1) prosecution for a criminal offense instigated by defendant; (2) issuance of a valid warrant, accusation or summons; (3) termination of the prosecution in favor of plaintiff; (4) want of probable cause; (5) malice; and (6) damage to the plaintiff. O.C.G.A. § 51-7-40. As previously discussed in section II(C)(2)(a) *supra*, plaintiff has quite clearly pled a state law malicious prosecution claim. Again, under Georgia law, "Lack of probable cause shall be a question for the jury, under the direction of the court…[u]nless the facts regarding probable cause are undisputed, it is a question for the jury". Willis v. Brassell, 220 Ga. App. at 353.

c. Count III: Intentional Infliction of Emotional Distress

Plaintiff has stated a claim for intentional infliction of emotional distress. Defendants correctly state the standard for determining intentional infliction of emotional distress under Georgia law, to wit: (1) the conduct must be intentional and reckless; (2) the conduct must be extreme and outrageous; (3) the existence of a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe." Bd. of Public Safety v. Jordan, 252 Ga. App. 577, 586 (2001). Further, "the conduct also must be of such serious import as to naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress. Otherwise, the conduct will not rise to the requisite level of outrageousness and egregiousness." (See Defendants' Motion p. 13).

A claim for wrongful official conduct in carrying out an arrest or prosecution may give rise to a claim for intentional infliction of emotional distress, and an official is not entitled to immunity where his conduct is intentional and outrageous. Reed v. City of Lavonia, 390 F. Supp. 2d 1347, 1370 (M.D. Ga. 2005)

Plaintiff's Complaint, which must be accepted as true for purposes of this Motion, states with specificity, that Defendant Garland, as the head of the RFPRA, intentionally and recklessly instituted and carried out the unjust and unwarranted prosecution of Armstrong with malice. (See Plaintiff's Complaint at ¶¶s 20-23; 26-30). These intentional and malicious acts by Garland directly resulted in the prosecution of Armstrong. (See Plaintiff's Complaint at ¶ 31). The prosecution resulted in emotional distress, humiliation, embarrassment, and damage to reputation. (See Plaintiff's Complaint at ¶ 37). Unjust and unwarranted criminal prosecution, where one's freedom is at stake, for any reasonable person, would certainly "naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress." Therefore, Plaintiff has pled a claim for intentional infliction of emotional distress.

d. Count IV: O.C.G.A. § 36-33-4

Thought they choose not to discuss Plaintiff's claims under O.C.G.A. § 36-33-4, Defendants appear to argue, in a footnote and in their introduction, that Plaintiff does not have a claim under O.C.G.A. § 36-33-4. They state that O.C.G.A. § 36-33-4 only relates to whether an official is entitled to immunity on other tort claims. The assertion that O.C.G.A. § 36-33-4 does not set forth an independent cause of action is simply wrong.

The Georgia Court of Appeals has made clear that individual municipal officials are liable to anyone who they harm by an unlawful official act, and that O.C.G.A. § 36-33-4 sets forth a independent tort claim for such actions. In City of Buford v. Ward, the Court held, "a claim under OCGA § 36-33-4 is essentially a tort action in which general as well as compensatory damages may be recovered." 212 Ga. App. 752, 755, 443 S.E.2d 279, 283 (1994). Accordingly, a cause of action does exist under O.C.G.A. § 36-33-4, and Plaintiff has clearly pled facts sufficient to state a cause of action under O.C.G.A. § 36-33-4. As discussed at II(C)(2)(a) and II(C)(2)(c) *supra*, and throughout Plaintiff's Complaint, Garland's official acts and failures to act were done "oppressively, maliciously, corruptly, and without authority of law". As these acts damaged Armstrong, Garland is individually liable under O.C.G.A. § 36-33-4.

e. Count V: Punitive Damages

Similarly, as discussed in Sections II(C)(2)(a), II(C)(2)(c), and II(C)(2)(d) *supra* and throughout Plaintiff's Complaint, Defendant Garland, individually, and as the Director of RFPRA, acted with the willful intent to injure Plaintiff, willfully covered up exculpatory evidence when it came to light, willfully refused to divulge exculpatory information to the police, and otherwise acted in bad faith and with a conscious disregard for Armstrong. Therefore, Plaintiff has stated a claim for punitive damages against Garland in both his personal and individual capacities.

3. Plaintiff's federal claims against Garland are not barred by qualified immunity, nor are Plaintiff's state law claims against Garland barred by official immunity.

a. Garland is not entitled to qualified immunity from plaintiff's federal claims

Defendants' contention that Garland is entitled to qualified immunity for the Federal malicious prosecution claim is incorrect. As previously noted, this case is closely analogous to the Buckner case, in which, as here, the Plaintiff's arrest and prosecution was caused by her supervisor, a Program Director, providing incomplete and misleading information to investigating authorities. As Defendants admit, Garland was acting within the scope of his duties as Executive Director of the RFPRA at all times relevant to this action. (See

Plaintiff's Complaint at ¶ 9; Defendants' Motion p. 15). Further, Defendants assume all of Garland's acts qualify as discretionary acts. Assuming, arguendo, this is true, Plaintiff has "the burden" of demonstrating that Garland violated clearly established federal law. Suissa v. Fulton County, 74 F.3d 266, 269 (11th Cir. 1996)(citation omitted). In order to satisfy this burden, Plaintiff must first establish that "the facts alleged show" that he "violated federal Law." Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151 150 L.Ed.2d 272 (2001). Once Plaintiff satisfies that initial burden, she then must establish that the right violated was "clearly established." Saucier, 533 U.S. at 201.

The right that Plaintiff seeks to vindicate here was "clearly established" at the time of her arrest and prosecution. As the Court properly held in Buckner, the Eleventh Circuit has recognized "a federal right to be free from prosecutions procured by false and misleading information." *Kelly,* 21 F.3d at 1549 (internal quotation marks and citation omitted). A government official may be found liable under § 1983 for instigating or causing an unlawful arrest or malicious prosecution. *Cf., e.g., Jordan,* 487 F.3d at 1354 (holding that "[i]n this Circuit, a non-arresting officer who instigates or causes an unlawful arrest can still be liable under the Fourth Amendment"). In addition, "[k]nowingly making false statements to obtain an arrest warrant can lead to a Fourth Amendment violation." *Whiting,* 85 F.3d at 585 n. 5 (citing *U.S. v. Martin,* 615 F.2d 318, 327-29

(5th Cir.1980)); *accord Kalina v. Fletcher,* 522 U.S. 118, 122, 131, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (holding that § 1983 may provide a remedy when a prosecutor acting as a "complaining witness" misrepresents information in a probable cause certification); *Kingsland,* 382 F.2d at 1232 (noting that "falsifying facts to establish probable cause is patently unconstitutional").

Plaintiff has sufficiently pled facts to show that Garland violated Federal law when he initiated and instituted the malicious prosecution of Armstrong in violation of her Fourth Amendment rights. Further, the Defendants can not argue that a citizens' rights to be free from unreasonable seizures and malicious prosecution in violation of the Fourth Amendment is not a "clearly established" right. Therefore, Garland is not entitled to qualified immunity for Plaintiff's Federal claims brought under § 1983.

b. Garland is not entitled to official immunity from plaintiff's state law claims

There is no official immunity for discretionary acts when those acts are undertaken with actual malice or the intent to cause injury. See Ga. Const. of 1983, Art. I, Sec. II, Par. IX (d) (as amended 1991); Teston v. Collins, 217 Ga. App. 829, 830 (1995). Defendants apparently agree. (See Defendants' Motion at p. 16).

The Supreme Court of Georgia has defined "actual malice" in the context of deciding official immunity, stating, "actual malice requires a deliberate *intention* to do wrong." Merrow v. Hawkins, 266 Ga. 390, 391, 467 S.E.2d 336, 337

(1996) (emphasis added). Official Immunity does not bar intentional infliction of emotional distress claims, nor any other intentional act done by a Defendant. The nature of those claims takes them out of the realm of official immunity. As discussed at II(C)(2)(a), II(C)(2)(c), and II(C)(2)(d) *supra* and throughout Plaintiff's Complaint, Plaintiff has sufficiently pled facts evidencing that Garland acted with malice and the intent to injure Plaintiff. Those facts include:

- Garland knew that other coaches at the RFPRA regularly deposited funds from parents into their personal bank account, for sports-related purposes, and that doing so was not indicative of theft (See ¶¶ 20, 23).
- Garland knew there was no RFPRA policy prohibiting such action (See ¶¶ 21, 23)
- Garland knew that the assistant gymnastic coach regularly did the exact same thing, yet he never investigation her, and later promoted her to fill Armstrong's position (See ¶ 22).
- Garland refused to turn over exculpatory evidence to investigators (See ¶¶ 27-29).
- Garland sought to financially benefit from the arrest and prosecution of Armstrong (See ¶ 30).

c. Plaintiff has pled sufficient claims against Garland in his official capacity

Plaintiff addresses Defendants' arguments advanced in Section V(B)(2)(c) of their Motion in her Sections II(C)(4) and II(C)(5) hereinbelow. However, assuming, arguendo, that the Federal counts brought against Garland in his official capacity were dismissed, it should be noted that all state law claims, as well as claims brought against Garland in his individual capacity would stand.

4. Plaintiff has sufficiently pled her claims against Defendant City of Rome so as to satisfy Monell

Defendants appear to contend that Plaintiff's claims against Defendant City of Rome fail under the Supreme Court's holding in Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 694 (1978). Defendants are correct that under Monell, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory of liability. Fortunately, Plaintiff does not advance an argument for liability pursuant to *respondeat superior* for her § 1983 claim against the City of Rome. While it is true that a local government entity may not be held liable under § 1983 solely for the acts of its employees (i.e. through a theory of *respondeat superior*), § 1983 liability may be predicated upon the acts of the *entity.* Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986); Monell, 436 U.S. at 694**.** A single decision by a person with final decision making policy — someone whose decisions may fairly be said to represent official policy —create liability on the part of the entity. Pembaur, 475 U.S. at 480.

At all times relevant to this action, Garland was the Executive Director of the RFPRA. (See Plaintiff's Complaint at ¶ 9). He was the ultimate policy-maker for the RFPRA, and thus under Monell, Plaintiff has pled sufficient facts to show that Defendant City of Rome may be held liable for his decisions as official policy maker for the RFPRA. Further, Defendant City of Rome may be held liable for Plaintiff's state law claims under the theory of *respondeat superior,* because, as discussed at length at II(C)(2)(b), II(C)(2)(c) and II(C)(2)(d) *supra*, the underlying state law claims against Garland have been sufficiently pled to state a cause of action.

5. Plaintiff has sufficiently pled her claims against Defendant Recreation Authority so as to satisfy Monell

Similarly, as discussed at II(C)(4) *supra,* RFPRA is liable for Garland's acts under both Monell (for Federal claims) and the theory of *respondent superior* (for State law claims), and Plantiff has sufficiently pled each such claim.

IV. CONCLUSION

All five Counts in Plaintiff's Complaint are sufficiently pled under Federal Rule of Civil Procedure 8, as clarified by Twombly and Iqbal, and each Count is clearly sufficient as a matter of law. Defendants' Motion should therefore be denied. In addition, because Defendants' Motion is frivolous, Plaintiff requests the Court sanction Defendant and award Plaintiff his costs in defending the Motion.

Respectfully submitted this 24th day of April, 2013.

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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Book Antiqua, 13-point font in compliance with Local Rule 5.1B.

Certificate of Service

The undersigned certifies the foregoing document was electronically filed on April 24, 2013 with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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